CAN A MORTGAGOR AFTER THE EXECUTION OF THE MORTGAGE CREATE AN EASEMENT IN THE MORTGAGE SECURITY?—The case of *Foote* v. *Yarlott et al.* (1908), — Ill. —, 87 N. E. 62, recently decided by the Supreme Court of Illinois, presents a question which is somewhat unusual. Yarlott owned an apartment house with a hall in the center dividing the building into what was called the north-half and the south-half. He borrowed five thousand dollars and gave his note therefor secured by a trust deed on the south-half; he borrowed another sum of five thousand dollars from a different person and as consideration for this gave his note secured by a trust deed on the north-half.

After the execution of these trust-deeds, Yarlott installed a heating plant in the building; the generating apparatus was in the north-half, but the pipes extended through the south-half as well as the north. Yarlott defaulted in the payment of the note secured by the trust-deed on the south-half; the holder of the trust-deed then filed a bill to foreclose it, and asked that an easement for the beneficial use of the heating plant be declared, upon the owner of the south-half paying a reasonable cost of its operation.

As the Illinois court divided by a vote of four to three in rendering their decision as to the easement, it is evident that a close point of law was involved. It seems to be conceded that had the heating plant been in the building before the execution of the trust-deed, an easement would have existed. But as it was not installed until after the execution of the trust-deeds, the exact question presented was whether or not an easement could subsequently be created in the security of the holder of the trust-deed on the north-half.

The judges who dissented gave as their reason for so doing that the trust-deed on the north-half gave to the holder as security the north-half free from any incumbrance; and that Yarlott could not afterward impose upon such north-half the burden of an easement in favor of some other property. The theory of the opinion derives some support from the dicta in *Martin* v. *Murphy et al.*, 221 Ill. 632, and *Lampman* v. *Milks*, 21 N. Y. 505, which are cited by the minority of the court.

A search through the English and American authorities has disclosed but one case containing a legal proposition analogous to the one under discussion. In *Murphy* v. *Welch*, 128 Mass. 489, the owner of two adjoining lots mortgaged one of them and subsequently conveyed the other, and attempted to create a right-of-way over the mortgaged premises in favor of the grantee. The court held that the owner of the equity of redemption could not create an easement against the mortgagee. WASHBURN'S EASEMENTS AND SERVITUDES, Ed. 4, p. 47, in an editor's note states the rule "A mortgagor in possession cannot impose an easement upon the mortgaged premises * * * which will bind the mortgagee." The editor cites but one case, *Murphy* v. *Welch*, supra, to support this statement.

The majority of the Illinois court conceded that no easement could be created to impair the security of the holder of the trust-deed on the north-half. Their theory was that the installation of the heating plant subject to the easement increased the security. This increase in the value of the security, together with the fact that the heating plant was installed as much for the

benefit of the south-half as for the north-half, incline the writer to believe that the case was correctly decided. However, it would seem, that the holder of the trust-deed on the north-half should be allowed to reject the heating plant altogether, and take his security as it was when the trust-deed was executed. No mortgagee should be compelled to accept a different security against his will; but under the circumstances, if it was accepted, it should be subject to the easement for the beneficial use of the heating plant.

F. O.

THE OHIO BULK SALES LAW.—In a note on the Bulk Sales Laws in the last number of this Review (pp. 504-507), reference was made to the fact that the Ohio law of 1902, entitled "An act to prevent fraud in the purchase, disposition or sale of merchandise," (95 O. L., 96) had been held to be invalid in the case of *Miller* v. *Crawford,* 70 Ohio St. 207, but no mention was made of the new law enacted in 1908. This new law was passed April 30th, 1908, and is entitled "An Act to Amend Sections 6343 and 6344 of the Revised Statutes of Ohio Relating to the Transfer of Stocks of Merchandise other than in the Usual Course of Trade." (99 O. L., 241). The act of 1902 made every sale in bulk of stocks of merchandise absolutely void, unless the parties to the transaction had complied with every one of the requirements stated severally in the six sub-divisions of the first section of the act. (See 70 Ohio St. 215-216). The new act makes such transfers presumptively fraudulent, and avoids some of the court's objections to the former act by an omission of many of the restrictive requirements contained in that act. The act of 1908 has not as yet, we believe, come before the courts of Ohio.